IN THE

Supreme Court of the United States

October Term, 1978

No. 78-637

CARMINE GALANTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEROME ROSENBERG
Attorney for Petitioner
Carmine Galante
NCC 150 Park Row
New York, New York 10007

Table of Contents

Table of Authorities

Cases:

Statutes and Rules:

Unites States Constitution:

IN THE

Supreme Court of the United States

October Term, 1978

No._____

CARMINE GALANTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court

Petitioner, Carmine Galante, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case as hereinafter described.

Opinion Below

The opinion of the Court of Appeals, is attached as Appendix A hereto, *infra.*

Jurisdiction

The judgment or decision of the United States Court of Appeals here sought to be reviewed bears date, September 21st, 1978.

As is more fully recited *infra*, Petitioner Galante duly preserved, in the District Court and Court of Appeals, the Federal Constitutional questions as to which we here seek certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Rule 22, Sub-division 2, of the Rules of this Court, since the Petitioner is claiming rights, privileges or immunities under the Fifth and Sixth Amendments of the Constitution of the United States.

Questions Presented

1. Did the Court of Appeals err as a matter of law based on the District Court's ruling that Petitioner Galante was not deprived of effective assistance of counsel on the assumption and unfounded conclusion of "manipulation," and was the District Court in error by adopting this view without a re-examination of new facts and law?

2. Was Petitioner deprived of his constitutional right to counsel of his own choice and his Sixth Amendment right to present witnesses on his own behalf?

3. Was Petitioner violated of his Sixth Amendment rights where the trial court forced unwilling counsel upon him and where counsel did not participate in three days of trial? Was Petitioner deprived of his rights when this constituted a total deprivation of counsel and, in effect, without counsel was forced to act as a *pro se* defendant when questioned by the trial court while without counsel?

Constitutional Provisions Involved

The case involves constitutional questions of the right to counsel, protection of counsel and due process of law (Fifth and Sixth Amendments).

Statement of the Case

This petition for a writ of certiorari is from a judgment rendered by the Court of Appeals dated September 21st, 1978, Docket Number 78-2054 (See Appendix A) (Moore, Timbers, Van Graafeiland), which affirmed a judgment of the United States District Court for the Southern District of New York (Pollack, J.) entered April 13, 1978, which dismissed, without a hearing, a motion pursuant to 28 U.S.C. Sec. 2255. (See Order of District Court, Appendix B.)

On June 25, 1962, Carmine Galante (Petitioner herein), with others, was convicted in the United States Court for the Southern District (MacMahon, J.) for the crime of conspiracy to violate the narcotics laws. On July 10, 1962, Petitioner was sentenced to a term of twenty years.

The United States Court of Appeals affirmed said conviction with opinion in *United States v. Bentvena*, 319 F.2d 916 (2d Cir., 1963). A petition for rehearing was denied on the 16th day of July, 1963. Certiorari was denied, 375 U.S. 940, 84 S.Ct. 345, ll L.Ed.2d 271 (1963). A petition for rehearing was denied on April 20, 1964. Subsequently, a motion was made to the original trial court for reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure. Said application was denied on February 5, 1964. All appellate remedies available to Petitioner have been exhausted.

Petitioner's parole was revoked, and a petition for a writ of habeas corpus was filed directly to the Supreme Court of the United States attacking his original judgment.

The Supreme Court denied leave to file said petition. See *Galante v. Attorney General*, 46 U.S.L.W. 3587 (U.S., Mar. 21, 1978).

Thereafter, a petition was refiled in the District Court. The issues presented in this appeal were raised in the District Court. Judge Pollack, in dismissing Petitioner's petition, ruled that the precise issue in point to our Point I was determined adversely on the merits by the Court of Appeals on his direct appeal. See *United States v. Bentvena, supra.*

The court further held that the trial court's forcing Petitioner to act *pro se* at the time of his trial was not controlled by the holding of *Faretta v. California*, 442 U.S. 806 (1975), because Petitioner objected to appearing *pro se*. These issues, coupled with the trial court's denial of admitting Petitioner's defense witnesses to testify, were never raised on the direct appeal under new facts and law.

It is to be noted, the Court of Appeals affirmed on judge Pollack's decision. The sitting court consisted of Judge Moore, who sat and ruled on Petitioner's original appeal.* We submit that Judge Moore could not render an impartial judgment and should have disqualified himself from the Panel.

Introduction

In this case of Petitioner, with a sentence of twenty years, fairness and justice require that close judicial scrutiny be devoted to ascertain whether the scales of justice were unlawfully tipped against him by any misconduct of the prosecutor and trial judge. We submit that precisely such a

*On June 13, 1963, Judge Moore wrote the opinion in point to our issue I, *Bentvena, supra.*

prejudicial tipping of the scales occurred in connection with the trial court's depriving Petitioner of effective assistance of counsel during his trial.

The following facts present everything of a substantive matter with reference to the trial and issues of law with a view to allowing the sufficiency of the prosecutor's and trial court's arbitrary conduct to speak for itself. For this Court's convenience, and to avoid repetition, we will develop our factual substance, which is primarily the basic foundation of our issues, consolidated with our argument at appropriate places *infra.*

It is respectfully submitted that in this case the occasion presents itself for this Court to inquire, under its powers of judicial supremacy, into the interest of preserving the principles of constitutional liberty and authentic judicial fairness, whether the phenomenon vernacularly known among the Bench and Federal Bar in New York as "a Judge MacMahon trial" is intrinsically an offense to due process and to proper judicial administration because, in and of itself, the very circumstances of a trial judge committing acts which are demonstrably designed to hamper and prevent a defendant from receiving a fair trial in a criminal case, cannot be countenanced.

Occasionally, in the legal or judicial history of a nation or a society, the name of a judge becomes associated with some distinctive feature of the judicial process of an era. In our time, in the Southern District of New York, we have the distinctive phenomenon known among the Bar as "Hanging Judge MacMahon," a judge who, in certain cases of Government concern, has allied himself with the cause of prosecution and who, in his heart and mind, will do everything possible to aid the Government in obtaining a conviction.

We shall develop the detailed circumstances which, we believe, justify our introductory remarks concerning the improper conduct of Judge MacMahon. Our argument, in

this respect, will show how the trial court did, under "prepense," subject Petitioner to serious deprivations on the crucial issues of his Sixth Amendment right to counsel.

Petitioner herein has no understanding of law nor is he familiar with these procedures. This brief has been perfected with the assistance of Jerome Rosenberg, an inmate lawyer who is acting for and on behalf of Petitioner as next of friend and counsel. Your writer, while in prison, has obtained a Bachelor and Doctorate Degree in Law and has been permitted to represent inmates and persons not imprisoned at jury trials, hearings and on appeals in both our State and Federal courts.

Presently, Petitioner Galante is being confined and detained under an alleged Parole violation.

Facts

Petitioner, along with 28 other defendants, was charged with violation of the Federal Narcotics Laws, 21 U.S.C., Sections 173 and 174, in an indictment filed May 5, 1960 in the Southern District of New York. The indictment contained eight counts: the first seven charged various defendants with substantive violations; count eight charged all the defendants with conspiracy to violate the Narcotics Law. Petitioner was charged only with count eight.

The trial commenced November 21, 1960, before Judge Levet and a jury, and ended in a mistrial on May 15, 1961. Fourteen of the defendants, including Petitioner, were brought to trial a second time on April 21, 1962, before Judge MacMahon and a jury. On June 19, 1962, the trial court granted a motion of acquittal as to the defendant Frank Mari. On June 25, 1962, the jury returned a verdict of guilty as to the remaining thirteen defendants on all counts in which they were named. On July 10, 1962, sentencing

took place. Petitioner received a 20-year sentence and a $20,000 fine, the maximum penalty for the conspiracy offense.

For the second trial, Petitioner consulted with various lawyers and finally decided on a Ms. Frances Kahn. He consulted with Messrs. Williams and Wadden on four or five occasions. He consulted with Mr. Jacob Sheintag on three or four occasions. After further deliberation he settled on Ms. Kahn.

Mr. Nicholas Ianuzzi was Petitioner's friend of 35 years, but not his attorney. Mr. Ianuzzi served temporarily as a stand-in for Petitioner's counsel between the first and second trials, but he did not have Petitioner's confidence.

Approximately three weeks before the second trial began on April 2, 1962, Petitioner secured Ms. Kahn and gave her the record of the first trial. Mr. Ianuzzi had allowed his name to appear as Petitioner's counsel of record up to April 2, 1962, the opening day of the trial. On that day, he informed the court that he was ill, that he knew nothing of the facts of the case, and that Petitioner had retained Ms. Frances Kahn to represent him.

Mr. Ianuzzi told the court that he had made a previous application to another judge to be relieved; that the judge had ruled he could be relieved, but only after other counsel was ready to proceed without any adjournment. Mr. Ianuzzi stated that Petitioner had procured other counsel who was ready to take over and proceed immediately, and inquired as to whether Ms. Kahn could be substituted for him. The court took the request under consideration.

Subsequently, Mr. Ianuzzi presented a stipulation of substitution, pursuant to which Ms. Kahn was to be substituted as Petitioner's counsel. At this point, the prosecutor stated that he had no objection to the substitution, but suggested to the court that Mr. Ianuzzi not be relieved. The

court accepted the suggestion and permitted Ms. Kahn merely to join with Mr. Ianuzzi as co-counsel. The court based this ruling on the ground that Ms. Kahn had informed the court of the proposed substitution only that morning, while she had been retained three weeks earlier. Ms. Kahn stated that she had no prior opportunity to advise the court of the substitution because she had not been sure that she could be ready in time. Later the same day, the Court signed the stipulation of substitution.

Thereafter, the court treated Ms. Kahn as Petitioner's sole counsel. An instance of this occured on May 16. Ms. Kahn was half an hour late at the opening of court. She excused her tardiness on the ground that she had been ill. The judge called Petitioner into the robing room and suggested that he must get either associate counsel of his own choosing, or he must provide now for coverage by one of the other attorneys in the case.

Petitioner did not act on the court's suggestion to procure stand-by counsel, in part because Ms. Kahn explained that it would be impossible to prepare other counsel at this stage (the trial had been in progress for a month and a half; there had been a long prior trial which ended in a mistrial, which had a transcript of over 14,000 pages) and because of the financial burden which stand-by counsel would entail.

On June 12, Ms. Kahn did not appear in court because she had met with an accident the preceding night and had been hospitalized. Evidently, the trial judge's law clerk was notified, for he called it to the attention of the Assistant United States Attorney in charge of the case. The latter conducted an informal investigation and reported to the court that he had spoken to physicians who had examined Ms. Kahn and had learned that there was a severe contusion. Without having seen any X-rays, one of the physicians stated that there was probably a hairline fracture. The court directed the prosecutor to prepare an order appointing a physician to examine Ms. Kahn.

Without even awaiting the results of the examination, the judge immediately had Petitioner brought before him in the robing room. The court inquired of Petitioner whether he had other counsel, to which Petitioner replied that he had not. Thereupon, the court recessed the trial and allowed Petitioner one day to obtain new counsel. Later that day, the court purported to discover that Mr. Ianuzzi was counsel of record in some manner and sent him a letter commanding him to be present the next day.

The next morning, June 13, Petitioner informed the court in detail about the efforts he had made to secure new counsel; that he had been unsuccessful so far; and that there was some hope that he could soon arrange for new counsel to appear. Ms. Kahn had not yet been examined by a court-appointed physician. At that point, the court appointed Mr. Ianuzzi to represent Petitioner. Mr. Ianuzzi had not participated in the case since the opening day when the court approved the substitution of Ms. Kahn. Both. Mr. Ianuzzi and Petitioner objected to the appointment. Mr. Ianuzzi informed the court that he was physically incapable of undertaking such a task and had been warned by his physician that to do so might be dangerous. In addition, Mr. Ianuzzi told the court that he had been discharged by Petitioner and said, "I know nothing about the facts, I know nothing about this man's defense, and there are thousands of pages of testimony taken that have to be reviewed." (Tr. 7441) The objections of Mr. Ianuzzi and Petitioner did not persuade the court. The trial was resumed that morning, immediately after the appointment of Mr. Ianuzzi.

At the time Mr. Ianuzzi was appointed, the trial had been in progress for over two months. The trial record consisted of 7,436 pages. Over 100 witnesses had been heard, and over 250 exhibits had been received. Only part of Petitioner's defense had been presented.

The court ordered Mr. Ianuzzi to remain in the courtroom under penalty of contempt of court, and do his level

best to represent Petitioner. Mr. Ianuzzi announced that he would remain in the courtroom but would refuse to participate. Although Mr. Ianuzzi was present in court for the next three days of the trial, the record shows no further participation by him in the trial.

Mr. Ianuzzi entered a hospital on the morning of Monday, June 18. The court gave Petitioner until 1:00 p.m. that day to procure new counsel. In the meantime, the court ordered the appointment of doctors to examine Ms. Kahn and Mr. Ianuzzi and ordered the preparation of body attachments for them in case they were found able to be present at the trial by 1:00 p.m. The doctors were unable to find objective symptoms of the pains in Mr. Ianuzzi's chest or the injuries suffered by Ms. Kahn, although Ms. Kahn claimed that her right leg was paralyzed. However, the body attachments remained unexecuted.*

At 1:15 p.m., the same day -- June 18 -- the court appointed Mr. Kenneth O'Connor to represent Petitioner. The court directed Mr. O'Connor to be ready to represent Petitioner when the trial resumed the next morning. Mr. O'Connor had been acting as the representative of Mr. Burton Turkus, who had been considering coming into the case to represent Petitioner. During the previous week, Mr. O'Connor, on behalf of Mr. Turkus, had attempted to obtain an adjournment of the trial in order to allow sufficient time to prepare Petitioner's defense. These requests were denied by the court.

Petitioner objected to the assignment on the ground that Mr. O'Connor was merely a representative sent to speak with him on behalf of Mr. Turkus. Mr. O'Connor objected to the assignment on the ground that he was totally unfamiliar with the case and totally unprepared to proceed

*Based on these factors, the District Court found "manipulation."

and that the time available to him for preparation (until 10:00 a.m. the next morning) would be wholly inadequate. He said "I still feel that I could not adequately represent the defendant and from my point of view afford the defendant a fair and constitutional trial." (Tr. 8087) Mr. O'Connor's motion for a continuance was denied. The court alleged to compensate for the shortness of time for preparation by directing the prosecutor to assist Mr. O'Connor in familiarizing himself with the case.

At the time Mr. O'Connor was appointed, the trial had been in progress over two months. The trial record consisted of over 8,000 pages. Over 120 witnesses had been heard and over 275 exhibits had been received in evidence. There had been a prior trial of Petitioner and the other defendants which had ended in a mistrial, which had a trial record of over 14,000 pages.

The trial resumed the next morning, with Mr. O'Connor attempting to represent Petitioner. Mr. O'Connor delivered his summation to the jury three days after his assignment to the case.

To compound Mr. O'Connor's problems, Petitioner's witnesses were no longer available, since the court had released them two days before Mr. O'Connor was appointed. An analysis of the circumstances surrounding this action by the court provides a further insight into the burdens under which the attorneys who were appointed to represent Petitioner were forced to labor.

At the first trial, several witnesses testified that they observed Petitioner in Florida at the same time the Government's chief witness testified that he saw Petitioner in New York City taking part in the alleged conspiracy. These witnesses were: Angelo Presenzano, Gloria Presenzano, Antoinette Acquivelli, and Peter Salanardi, who all testified that they lived with Petitioner at two motels in Florida during the time in question; Clark Geartner, a lifeguard at one of the motels; Bernard Shaffer, the manager of one of

the motels; Joey Posnick, a 15-year-old boy who went fishing with Petitioner; Joseph D. Hanny, a waiter at one of the motels; Larry Cotzin, a Detective Sergeant with the Miami Police Department. Unfortunately for Petitioner, the jury at the first trial was never allowed to pass judgment on the testimony of these witnesses, since a mistrial was declared.

At the second trial, Petitioner's attorney, Frances Kahn, called Angelo Presenzano, Gloria Presenzano, and Peter Salanardi as her first three witnesses concerning Petitioner's presence in Florida during the period in question. These witnesses were Petitioner's companions at the Florida motels. After the third of these witnesses, Peter Salanardi, had completed his testimony, the court informed Ms. Kahn that she would be allowed to present only one more witness concerning Petitioner's presence in Florida on the ground that further testimony would be merely cumulative. After Ms. Kahn argued strenuously that she desired to put several independent witnesses as to the Florida situation on the stand, the judge relented and modified his ruling to allow two independent witnesses.

Before Ms. Kahn had a chance to put any more witnesses on the stand, she suffered a fall and was hospitalized. On June 15, while Ms. Kahn was in the hospital and while Petitioner was without the assistance of other counsel of his own choosing (Mr. Ianuzzi had been appointed to represent Petitioner over the objection of Petitioner and himself; he was totally unprepared to defend Petitioner), the court asked Petitioner himself whether or not he wanted his other Florida witnesses to stay in New York and be put on the stand. Petitioner replied that he did not want to make that decision on his own, but he felt that he should be able to be advised by counsel on that point. Since Petitioner would not indicate whether or not he wanted the witnesses to stay to testify, the court released them from their obligation to remain under penalty of contempt. The witnesses so released were Joey Posnick, Larry Cotzin, Joseph Hanny,

and a Mrs. Myrtle. All of these witnesses, with the exception of Joseph Hanny, returned to Florida immediately.

Subsequently, Mr. Kenneth O'Connor was appointed to represent Petitioner. At Mr. O'Connor's insistence, the court decided to allow the use of all of Petitioner's Florida testimony. This turned out to be a shallow concession, however, since all of the witnesses except Hanny had returned to Florida. Even Mr. Hanny failed to show up to testify. The court did allow Mr. O'Connor to read to the jury the testimony at the first trial of the witnesses who had returned to Florida, explaining to the jury that the witnesses were "unavailable."

Reasons for Granting the Writ

POINT I

The Court of Appeals Erred as a Matter of Law Based on the Trial Court's Ruling That Petitioner Galante Was Not Deprived of Effective Assistance of Counsel on the Assumption and Unfounded Conclusion of "Manipulation," and the District Court Was in Error by Adopting This View without a Re-examination of New Facts and Law

In view of Judge Moore's expositions of the principles of law applicable to the issue of manipulation and possible waiver, we shall attempt to treat the facts leading up to those issues which he treats and expound on them. Suffice it to say that the Court of Appeals on that point is incorrect. There are numerous decisions of other courts of appeals in the various circuits and the Second Circuit's decision conflicts with the decisions of the Third Circuit in relation to manipulation.

Judge Moore, in writing for affirmance on our first issue, considered that Judge MacMahon's assumption of

manipulation was a valid cogent reason to reject Petitioner's claim of being denied the right to effective assistance of counsel. The Court of Appeals adopted the reasoning of the District Court's conclusion to hold manipulation.* The trial judge pointed out the following factors in discussing the above holding. The informal discussion and reports of two appointed physicians by the court who examined both attorneys, *infra*, that stated to the trial judge, "they were unable to find 'objective' symptoms of the pain." From the above quoted facts, one has to wonder in awe how on earth a doctor could possibly find "objective" symptoms of pain!

First, in analyzing these factors, pain is not "objective," but a "subjective" symptom as a warning that something is wrong within the body. Pain derives through the autonomic or peripheral or central nervous system; pain cannot be seen under X-ray or any other methods, nor can it be found. Pain can only be expressed to a physician. The statements of the two doctors are not in accord with medical evidence and are absolutely contrary to science and are totally without merit. It is precisely and only these erroneous factors that the trial judge took into consideration, aside from some other minute unfounded statements, to decide in his mind manipulation. The Court of Appeals adopted this reasoning to affirm on that issue.

As mentioned above, the Second Circuit justified any violations of Petitioner's right to counsel on the ground that he had "manipulated" that right. Although it is difficult to find any facts which would support such a loaded accusation, the facts indicate why the Second Circuit chose these standards rather than the strict standards of waiver.

The Second Circuit bases its conclusion that the right to counsel was being manipulated on the following facts:

---

*Bentvena, supra.

Petitioner's counsel, Frances Kahn, was hospitalized; Petitioner's appointed counsel, Nicholas Ianuzzi, was hospitalized; doctors appointed by the court found no objective symptoms of pain or illness when they examined Ms. Kahn and Mr. Ianuzzi; Petitioner objected to the appointment of Mr. Ianuzzi and Mr. O'Connor and failed to retain other counsel. 319 F.2d at 937.

When these factors are analyzed closely, it is extremely difficult to find anything that might be called manipulation. It is impossible to conclude that the facts amounted to a waiver of the right to counsel under the law.

One factor relied on by the court is that the doctors appointed to examine Ms. Kahn and Mr. Ianuzzi in the hospital were unable to find any objective symptoms of injury or illness. It is difficult to believe that members of the bar would intentionally feign illness rquiring hospitalization in order to avoid their obligations to represent a client. It strains credulity to infer that Frances Kahn, who had represented Petitioner vigorously until the time of her accident, and who was in the middle of presenting Petitioner's case, would suddenly decide to leave her client without the benefit of counsel at a crucial point in the trial.

Mr. Ianuzzi, a former Assistant United States Attorney, had been ordered to remain in the court to represent Petitioner under the threat of contempt. It is incredible to conclude that he would intentionally risk being subject to such a penalty by feigning illness. In fact, the record shows quite clearly that Mr. Ianuzzi was suffering extreme pain at the time the trial started and when he was appointed to represent Petitioner.

Curiously, the Second Circuit fails to mention in its opinion that at the time of appointment of Mr. Ianuzzi, the information which was available to the court as to Ms. Kahn's injury consisted of the following: that Ms. Kahn had tripped and fallen and injured her hip, that there was severe contusion, and that there was probably a hairline fracture.

It was not until June 18, a week after Ms. Kahn had suffered her fall, that the doctors appointed by the court conducted their examination. From these facts, it would seem impossible for the trial court to have concluded on June 13, when Mr. Ianuzzi was appointed, that the right to counsel was being "manipulated."

It is equally difficult to find any manipulation in Petitioner's objections to the appointment of two unprepared attorneys, who were not of his choosing.

In point to the District Court's finding, it was error to assume the doctor's statements. Since there were facts to be resolved on the basis of their incorrect medical findings to hold manipulation, an evidentiary hearing should have been held by law, as there is a dispute to the factual findings, said statements may be evidentiary but not conclusory. See *United States v. McCarthy*, 443 F.2d 591 (1970).

In *United States v. Bergamo*, 154 F.2d 31 (3d Cir., 1946), on the first day of the trial, the District Court refused to allow out-of-state counsel who had been retained as chief counsel to represent the defendants at trial. The District Court denied a motion for continuance by local counsel to allow him time to familiarize himself with the case. A jury was drawn that day and the trial commenced the next morning. As mentioned above in the *Bergamo* case, appointed counsel refused to put forward any defense because the defendants felt he was unprepared to defend them. Although appointed counsel expressly stated that the defendants "waived" their right to put forward a defense, the court found that, under the circumstances of that case, the rights of the defendants had not been waived. Rather, counsel was merely informing the court that he could not proceed in view of his unfamiliarity with the case.

In this case, as in the *Bergamo* case, the defendant (Petitioner) objected to being represented by unprepared

counsel not of his choosing. Also, here both appointed attorneys objected to the refusal of the court to allow sufficient time for preparation. Here, as in *Bergamo*, unprepared appointed counsel (Mr. Ianuzzi) refused to participate in his client's defense because he was unprepared to adequately represent him. Yet, here, the Second Circuit finds that there was manipulation which justified any deprivation of Petitioner's rights, while in *Bergamo*, the Third Circuit concluded that essentially similar facts did not establish that defendants had waived their rights.

The Court of Appeals reversed the conviction on the ground that the defendants had been denied the assistance of counsel. The conclusion that assistance of counsel had been denied was based on two grounds: (1) defendants had been denied counsel of their own choosing; and (2) representation by counsel had not been effective. In explanation of the second ground, the court stated "Assistance is not effective when counsel has insufficient time to prepare his defense." 154 F.2d at 34.

As to Mr. Ianuzzi's representation, it is obvious that he was not allowed sufficient time to prepare. Although there is some question as to whether Mr. Ianuzzi technically was Petitioner's counsel at the time he was directed to represent Petitioner, there is no question about the fact that he was totally unprepared to represent Petitioner at that time. Under these circumstances, the immediate resumption of the trial was a violation of Petitioner's right to effective assistance of counsel. All the cases cited stand for the proposition that the right to counsel is abridged if the trial is commenced immediately after appointment of counsel. The same reasoning applies to an immediate resumption of trial after counsel is appointed.

The facts of this case are very close to those in the *Bergamo* case, *supra*. There, even though local counsel had been counsel of record for three weeks prior to trial, when defendants' counsel in chief was disqualified, the court

erred in refusing to allow local counsel time to prepare the defense. In fact, this case presents an even greater violation of the right to effective assistance of counsel. Here, the trial had already been in progress for two months and the record exceeded 7,000 pages.

Under the reasoning of the above case, it is irrelevant whether or not the representation appears to have been effective if, in fact, counsel was not allowed sufficient time to prepare the defense.

The failure of Mr. Ianuzzi to formally request a continuance should not nullify the violation of Petitioner's rights, especially when both Petitioner and Mr. Ianuzzi objected so strenuously to the appointment.

As to Mr. O'Connor, the facts are even more compelling. Before he was appointed, Mr. O'Connor had had no connection with the case. He was given less than 18 hours to familiarize himself with the facts, not allowing time for sleep. "Whether time allowed counsel for a defendant for preparation for trial is sufficient depends upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and pertinent facts, and the availability of material witnesses." The time allowed for Mr. O'Connor to prepare was certainly not sufficient. In the *Bergamo* case, the actual trial did not commence until the day after the appointment of counsel; yet the time for preparation was held insufficient. Here, a conspiracy trial involving 14 defendants had been in progress for over two months when the appointment was made. Surely, *Bergamo* alone would compel reversal of Petitioner's conviction.

In *Palumbo v. State of New Jersey*, 334 F.2d 524 (3d Cir., 1964), the Third Circuit reiterated its careful approach to the issue of waiver of counsel. After an exhaustive examination of the facts surrounding the waiver issue, the court concluded that the defendant had not waived his right to counsel. In reaching its conclusion, the court stated:

> Whether there has been an effective waiver of the right to counsel must depend on the facts and circumstances of a particular case, including the background, experience and conduct of the accused. 334 F.2d at 532

The court repeated the rule that the "courts indulge every reasonable presumption against waiver (of the right to counsel)." *Id.* Finally, the court quoted the language of *Carnley v. Cochran*, 369 U.S. 506, 516 (1962):

> Presuming waiver from a silent record is impermissible. The record must show or there must be an allegation and evidence which show that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. 334 F.2d at 533

In order to determine whether the law of the Third Circuit on assistance of counsel is contrary to the law in the Second Circuit, it is necessary to look not only to the rule announced by the Second Circuit in affirming Petitioner's conviction, but to how the rule was applied to the facts of that case. Such an inquiry will not only show the conflict in rules of law between the circuits, but will also show in Petitioner's case that when the trial court considered the question of waiver, it obviously did not inquire into all the circumstances to see whether a waiver had occurred.

Assuming, for purposes of argument, as Judge Pollack apparently did, that this precise issue was determined on the merits by the Court of Appeals adversely to him, Judge Pollack's ruling is misplaced, since we have developed new factual substance which goes to the heart of the so-called manipulation issue.* The ends of justice require re-examination of a legal issue if there has been a change in law or

---

*The Court of Appeals adopted Judge Pollack's opinion. See Appendix A.

factual matter substance which could damage the entire scope of a previously determined issue. See *Davis v. United States*, 417 U.S. 333, 342 (1974). A motion pursuant to Section 2255 to raise the same legal ground clearly indicates the burden is on the applicant to show the ends of justice would be served by a redetermination of the issue. *Sanders v. United States*, 373 U.S. 1, 15, 197 (1963). We have met that burden and the court was under obligation to hold a hearing to resolve the new issues of fact on the merits.

The court failed to hold an evidentiary hearing to resolve the issues of fact, which is mandatory to reach that question and answer. *Townsend v. Sain*, 372 U.S. 293; *Smith v. Yeager*, 393 U.S. 122 (1968).

In conclusion, it has been shown that there is a clear conflict between the rules of law in the Second and Third Circuits on the subject of the right to assistance of counsel, and that under the Third Circuit rule, Petitioner's conviction is void since he did not waive that right. Under Rule 19, Sub-division B of the Rules of the Supreme Court, certiorari should be granted.

POINT II

Petitioner Was Deprived of His Constitutional Right to Counsel of His Own Choice and His Sixth Amendment Right to Present Witnesses on His Own Behalf

During Petitioner's trial and throughout all proceedings, it is clearly set forth that he demanded and requested counsel of his own choice, which he had at the inception of his trial and during his trial, until a mishap placed his attorney in the hospital. The court, upon his erroneous beliefs, see Point I, *supra*, appointed two unprepared attorneys to defend Petitioner who were not of his own

choosing and Petitioner objected vigorously for a week's time to have a new attorney of his own choice to represent him. It is clear that contact was made with the new attorney and progress was made with the fact that within a short time he would be there to represent Petitioner, see Facts, *supra*. The court disregarded Petitioner's request and had the trial continue with Mr. Ianuzzi first to represent Petitioner (he will be discussed in depth in Point III, *infra*). Mr. Ianuzzi was forced upon Petitioner against his wishes and objections, as was Mr. O'Connor.

The trial judge's appointments of two unprepared attorneys violated Petitioner's Sixth Amendment right to counsel of his own choosing, without a need of actual prejudice being shown. In *Long v. State*, 166 S.E.2d 365 (1969), a defendant's attorney was absent from court because he was in the hospital with his sick wife. The trial court directed the defendant to employ his attorney's associate to represent him because there would be a delay before return of his own counsel. The court held:

> Each person has the right to counsel of one's own choice,...the court abused its discretion by denying the defendant the right of counsel of his own choosing.

The likelihood of prejudice, not its actuality, is inherent where desired counsel of one's own choosing is lacking at any critical stage of a proceeding. Our advanced propositions of law are upheld on firm ground. See *Faretta v. California*, 442 U.S. 806 (1975). The Supreme Court in this landmark decision cleared cloudy water in an unbroken series of counsel cases extending over a long period of time and stretch of the Supreme Court's history that in criminal cases the accused is entitled to the full protection of the spirit of the Sixth Amendment. The Court held that for a defendant to be forced to accept against his will an appointed lawyer by any court is unconstitutional.

Faretta speaks of *assistance* of counsel. The spirit of the Sixth Amendment contemplates that counsel, like other defense tools guaranteed by that Amendment, shall be willing aid to a willing defendant -- not an organ of the State interposed between an unwilling defendant and his constitutional rights. To thrust counsel upon an accused, against his considered wish violates the spirit of the *Sixth Amendment* and the logic of the *First Amendment*. In such a case, counsel is not an assistant, but a master. We state the principles of *Faretta* are directly in point to Petitioner's *Sixth Amendment* issue, where both attorneys were forced upon him while on trial, depriving him of counsel of his own choice and, thus, rises to a constitutional violation per se. In order to place the magnitude of this failure in Petitioner's case in proper perspective, it is imperative that the historic function of counsel and client be reviewed against judicial tyrants and against improper courtroom procedure, which we will deal with in our Point II, *infra*. Petitioner was deprived of his constitutional rights via the *Sixth Amendment* to have counsel of his own choice.

The *Sixth Amendment* further commands that an accused has the sole right to produce witnesses on his behalf. It is noteworthy that the trial court released and dismissed all Petitioner's defense witnesses after Petitioner, without counsel present, would not answer the trial court's questions concerning putting his witnesses on the stand. The trial court refused to protect Petitioner's rights when he had no counsel present. The trial court forced Petitioner into a *pro se* position without Petitioner's consent to act *pro se*. We, therefore, have a dual violation: a clear constitutional deprivation under *Faretta, supra*, forcing Petitioner to act *pro se* where he could not make an intelligent decision; and a further denial of defense witnesses. Beyond doubt, no manipulation can even be assumed here -- the trial court, on its own, committed these acts.

Few rights are more fundamental than that of an accused to present witnesses in his own defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Webb v. Texas*, 409 U.S. 95 (1972). Just as an accused has the right to confront prosecution witnesses, he has a constitutional right to present his own defense by putting his witnesses physically before the jury. *Cf. Washington v. Texas*, 388 U.S. 14, 18 L.Ed.2d 1019, 87 S.Ct. 1920, *Webb, supra*. The trial court's conduct violated Petitioner's constitutional rights, which demands a reversal.

POINT III

Petitioner Was Violated of His Sixth Amendment Rights Where the Trial Court Forced Unwilling Counsel upon Him and Where Counsel Did Not Participate in Three Days of Trial. Petitioner Was Deprived of His Rights When This Constituted a Total Deprivation of Counsel and, in Effect, without Counsel Was Forced to Act as a *Pro Se* Defendant when Questioned by the Trial Court

A number of constitutional issues loom large in the wake of the above violations which need ventilation. To leave these critical legal questions unattended would be outrageous. We have here the seeds of a major constitutional controversy.

Judge MacMahon's lip service during the trial in point to Petitioner's counsel problems is a hodgepodge of misconstruction of the true facts and reasons incongruously arrayed in a plethora of inopposite implications further adorned with erroneous argument under the guise of fairness on the part of the trial judge that he (the court) was the upright fair judicial officer attempting his best to protect the rights of Petitioner whom he inferred was using obstructionist tactics to hamper his conspiracy trial for which he was convicted.

The judicial artfulness by Judge MacMahon was clever, indeed, very clever. But as one proceeds further into the murky waters of this well-hatched plot, the water begins to clear and the reflections appear that the Judge was committing a conspiracy with the Government by using every devious and deceptive method to prevent Petitioner from having and obtaining proper counsel to protect his rights, thus placing a noose around his neck.

Mr. Ianuzzi was appointed by the court; both he and Petitioner objected. Mr. Ianuzzi told the court he knew nothing about the case, testimony or facts. The court ordered Mr. Ianuzzi to remain in the courtroom under penalty of contempt and do his level best to represent Petitioner. At the time Mr. Ianuzzi was appointed, the trial had been in progress for over two months, the record consisted of 7,436 pages and over 100 witnesses had been heard -- nothing of which Mr. Ianuzzi knew or heard about.

Mr. Ianuzzi announced that he would remain in the courtroom but he would refuse to participate. For the next three days of trial before a jury, Mr. Ianuzzi was present but did not participate in any manner.

The above classically exemplifies our contentions. It is more than crystal clear that the trial judge, under prepense each aiding and abetting the other, the prosecutor, with the expressed intent of conspiring to injure the federally protected rights of Petitioner by depriving him of counsel of his own choosing, cannot be disputed. Their arbitrary and fortuitous conduct borders on the diabolical. Deceit is their "forte," indeed, they are "Masters of Deceit," but now they are past masters. See Point II, *supra*.

How fair and just can this be termed, we must go further. Petitioner sat at the defense table with attorney Ianuzzi, who did not speak or confer with him, nor participate in the trial at all. Without being sarcastic, Petitioner's position was analagous to as if he had no attorney at all. *Gideon v. Wainwright*, 372 U.S. 335, Sl.Ed.2d 799, 83 S.Ct. 792, 93 A.L.R.2d 733, cases cited therein.

Recently, the United States Supreme Court, in *Geders v. United States*, Slip Opinion No. 74-5968, decided March 30, 1976, held that an order preventing a defendant from consulting with his counsel "about anything" during a 17-hour overnight recess, impinged upon his right to the assistance of counsel guaranteed by the *Sixth Amendment*. While the facts may differ in *Geders*, we believe the well-established principles which flow from these strictures constitute grave violations in substance to Petitioner's case.

In Petitioner's case, Mr. Ianuzzi did not consult, speak or participate in the trial for three days during a critical stage of the proceedings before a jury. Thus, the noose was firmly tightened.

The decision of *Faretta* has many holdings, and the decision is retroactive and applies to and controls Petitioner's case on all fores. One of the main holdings is in point where the court cannot force an attorney upon a defendant who wants to act *pro se* and defend himself. This is what occurred in *Faretta* and the Supreme Court reversed at 45 L.E.D.2d 582. The point is in direct line in point to Petitioner; the trial court forced an attorney on him. We have another crucial issue upon a close analysis. By Ianuzzi's conduct, Petitioner was pitted against defending himself and having no knowledge of the law. Therefore, the trial court forced him into a *pro se* position. Just as a court cannot force an attorney upon a defendant, a court cannot force a defendant to act or be placed in a position to proceed in a *pro se* manner.

In dispensing with this issue in his opinion, Judge Pollack states that *Faretta* would not affect Petitioner and the holding is inapplicable to this case because Petitioner objected to appearing *pro se*. It appears that Judge Pollack is confused. That confusion can be attributed to the fact that *Faretta* commands that a defendant is entitled to appear *pro se*, and, since he objected, the court did not pursue it. Judge Pollack apparently has missed the point. The trial

court's actions made Petitioner a *pro se* defendant over his objections, and, if anything, Petitioner's objection reinforces that position and *Faretta*'s principles control and apply on solid ground with Judge Pollack's confirmation on just this issue -- Petitioner objected!

Petitioner was further placed into a *pro se* position when the trial court, without any counsel present, held a discussion, debate and discharged Petitioner's witnesses. We must restate that no manipulation can be inferred in this case -- unless the trial court committed the act of manipulation. The legalistic principles apply directly on sold ground. Petitioner was violated under *Faretta* in its totality.

The argument we will now develop for this Court is novel and unique, but possesses the stern qualities of the meat and substance of our issues.

In our description, *supra*, of the restrictive holds placed upon Petitioner, there appears to resemble a "Hobson's choice," a person confronted by no choice, or an alternative, but impaled as a violator upon either when chosen. The analysis of the Hobson's choice was revealed in the 17th Century when Thomas Hobson let horses, but required customers to take the one nearest the door, *i.e.*, no choice. The concept of Hobson's choice was also applicable in judicially-created rules, and in 1968, Justice Harlan referred to a prior dilemma confronting defendants in prosecutions for possessary crimes: "We eliminate that Hobson's choice." See, *cf.*, *Simmons v. United States*, 390 U.S. 377, 391, 394; S.Ct. 967; 19 L.Ed.2d 1247 (1968).*

*To illustrate, Congress enacted a wagering tax in 1951, *e.g.*, compelling a bookmaker to register and pay a $50 tax. In effect, therefore, he was compelled to admit his illegal activities and become subject to state penal law -- he could refuse money and thereby violate the tax law. The Court at first upheld the law, but 15 years later upheld the individual in his refusal to register. See, *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 679.

While the facts may differ, *supra*, the legalistic principles under substantive due process fit and uphold our propositions. Thus, in effect, Petitioner was controlled under the theory of a Hobson's choice -- no choice.

Under our Questions Presented, II and III, which arise from intervening decisions of this Court, *Faretta* and *Geders supra*, are herein urged as meriting certiorari.

Conclusion

The violations that occurred upon Petitioner in this instant case were grave errors of law, and they rise to constitutional infirmities within the strictures of the *Fifth* and *Sixth Amendments*. This case is a proper vehicle, we submit, for announcement by this Court of a rule of constitutional fairness and decency which would put the courts on notice that such official misconduct that was present in this case will not be countenanced in future preparation and presentation of cases. The acts and conduct committed by the Government and the trial court are incompatible with a civilized system of criminal justice.

It is clear that Petitioner did not receive a fair trial and that his rights were sacrificed by the Government and the trial court. This case presents a classic opportunity for a reaffirmation of that standard -- "equal application of the law" -- and one standard of justice for all.

It is respectfully submitted that this petition for a writ of certiorari should be granted, the judgment of the Court of Appeals reversed, and a new trial ordered, or in the alternative a remand for an evidentiary hearing.

Respectfully submitted,

JEROME ROSENBERG
Attorney for Petitioner
Carmine Galante

APPENDIX

Appendix A - Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 78-2054

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of September, one thousand nine hundred and seventy-eight.

Present:

Hon. Leonard P. Moore

Hon. William H. Timbers

Hon. Ellsworth A. Van Graafeiland

Circuit Judges.

Carmine Galante,

Petitioner-Appellant.

v.

United States of America,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was taken on submission.

Appendix A - Opinion of United States Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed* on the opinion of Judge Pollack dated April 12, 1978.

/s/ _____
Leonard P. Moore

/s/ _____
William H. Timbers

/s/ _____
Ellsworth A. Van Graafeiland
Circuit Judges.

Appendix B - Opinion of United States District Court

78 Civ. 1346 (MP) *Pro Se*

Carmine Galante,
Petitioner,

v.

United States of America,
Respondent.

This is a petition for habeas corpus on behalf of a federal prisoner, brought pursuant to 28 U.S.C. § 2241. In 1962, Galante was convicted of conspiracy to violate the narcotics laws, following a jury trial before the Honorable Lloyd F. MacMahon. Judge MacMahon sentenced him to a twenty year term of confinement. In January, 1974 Galante was mandatorily released pursuant to 18 U.S.C. § 4163, but on October 11, 1977 he surrendered to answer a mandatory release violator's warrant. *See Galante v. Warden, Metropolitan Correctional Center*, No. 77-2132 (2d Cir. Dec. 9. 1977). Since then his mandatory release status has been revoked by the United States Parole Commission: he presently is appealing that decision to the Commission *en banc*. This petition attacks Galante's conviction on the ground that his Sixth Amendment right to counsel allegedly was violated in connection with two substitutions of counsel appearing on his behalf at the trial. For the reasons set forth below, the petition is dismissed.

First, Petitioner is not entitled to habeas corpus relief, pursuant to section 2241, because he has not made a motion attacking his sentence in the sentencing court, pursuant to 28 U.S.C. § 2255. That section provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to

> apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

In general, the scope of available relief under sections 2255 and 2241 is identical. The purpose of enacting section 2255 was simply to provide a forum, the sentencing court, which normally would be more convenient than the forum appointed for habeas corpus petitions, the court whose territorial jurisdiction encompassed the place of confinement. *Kaufman v. United States*, 394 U.S. 217, 221-22 (1969); *United States v. Hayman*, 342 U.S. 205, 212-19 (1952). Since in this case the District Court at the place of confinement is also the sentencing court, there can be no basis for permitting a section 2241 petition on the ground that a section 2255 motion would be inadequate.

In support of the contention that a petition pursuant to section 2241 is proper, Petitioner cites several cases in which the courts at the place of confinement entertained such petitions on the ground that the applicable law of that Circuit differed from the law of the Circuit in which the sentencing court lay. The argument is beside the point, since the section 2241 court and the sentencing court are the same, and are in the same Circuit. In this connection, it is noted that the Supreme Court denied Galante leave to file a petition for habeas corpus three days before his petition was filed in this court, *see Galante v. Attorney General*, 46 U.S.L.W. 3587 (U.S. Mar. 21, 1978), and inferred that this argument was intended for another audience.

Petitioner also has moved to disqualify Judge MacMahon, on the grounds that he will be called as a witness and is prejudiced. However, this does not justify proceeding under section 2241. Section 2255 requires that

motions thereunder be heard by the sentencing court, but this does not require that they be heard by the sentencing judge. *Shale v. United States*, 418 F.2d 210, 212 (5th Cir. 1969) (per curiam); *Halliday v. United States*, 380 F.2d 270, 273 (1st Cir. 1967); *see* 2 C. Wright, Federal Practice and Procedure, Criminal § 600, at 631-32 (1969). Calendar Rule 9(A) of the Southern District of New York provides:

> When the petition [pursuant to 28 U.S.C. § 2255] is in proper form, the *Pro Se* Clerk shall submit the application to the judge who accepted the plea or sentenced the defendant, whichever is applicable.

However, Rule 9(A) also provides for reassignment in the event that the sentencing judge is disqualified. If the judge is disqualified, he will recuse himself. 28 U.S.C. § 455. Further, the Petitioner may obtain an impartial adjudication of a motion to disqualify. 28 U.S.C. § 144. Accordingly, the alleged disqualification of the judge to whom a section 2255 motion would be assigned pursuant to Rule 9(A) is not a basis for proceeding under section 2241.

The Government suggests that, nonetheless, since Galante is not entitled to relief in any event, the petition should be treated as a motion pursuant to section 2255 and denied on the merits, in the interests of judicial economy. The Court accepts the suggestion.

A motion pursuant to section 2255 may be denied without a hearing if 1) the same legal ground asserted in the application previously was determined adversely to the applicant by a federal appellate court, 2) the prior determination was on the merits, and 3) the ends of justice would not be served by reaching the merits. *Kapatos v. United States*, 432 F.2d 110, 112-13 (2d Cir. 1970), *cert. denied*, 401 U.S. 909 (1971); *see Kaufman v. United States*, 394 U.S. 217, 227 n.8 (1969) (dictum); *Sanders v. United States*, 373 U.S. 1, 15-17 (1963). *See also United States ex rel.*

Schnitzler v. Follette, 406 F.2d 319, 322 (2d Cir.), *cert. denied*, 395 U.S. 926 (1969). If the ground asserted has been determined against the applicant on the merits, the burden is on the applicant to show that the ends of justice would be served by a redetermination of the issue. *See Sanders, supra*, at 17.

Galante's papers frankly avow, and a review of the record confirms, that the precise issue raised herein was determined adversely to him, on the merits, by the Court of Appeals on the appeal from his conviction. *United States v. Bentvena*, 319 F.2d 916, 937 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963). The ends of justice require reexamination of a legal issue if there has been a change in the applicable law since the initial determination, *Davis v. United States*, 417 U.S. 333, 342 (1974), and in this connection Galante refers to the holding of *Faretta v. California*, 422 U.S. 806 (1975), that a criminal defendant is entitled to appear *pro se*. However, this holding would not affect the Court of Appeals' determination that Galante attempted to manipulate his right to counsel for the purpose of obstructing the trial. Further, it is inapplicable to this case because Galante objected to appearing *pro se*. *United States v. Bentvena, supra*. The petition also refers to decisions of the United States Court of Appeals for the Third Circuit, but they could not reflect a change in the applicable law. Galante correctly acknowledges that he is not entitled to relief under the law of the Second Circuit, Petition 25. No other ground is advanced for reconsidering the Court of Appeals' determination of Galante's claim.

Accordingly, treating the petition as a motion pursuant to section 2255, the motion is denied.

SO ORDERED.

April 12, 1978 /s/_____

Milton Pollack
U.S. District Judge